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Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights *This article is based upon the Institute for European Public Law Annual Lecture delivered at the University of Hull in March 2013.

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At the end of the last century I examined the emerging jurisprudence of the European Court of Human Rights (hereinafter the Court) on the topic of the promotion of democracy.¹ My research demonstrated that the Court saw pluralism to be the keystone of its conception of democracy:

As the Court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb...²

Institutionally, political parties were crucial bodies because of their contribution to, *inter alia*, fostering public debate on matters of general concern.

Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. By relaying this range of opinion, not only within political institutions but also- with the help of the media- at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society...³

But it was the Member States that bore the ultimate responsibilities, under the European Convention on Human Rights (hereinafter the Convention or the ECHR), to guarantee the essential elements of democracy.

Since that time many significant events have taken place in the political lives of various Member States, with examples including Georgia's "Rose Revolution" of 2003 when mass public protests about the conduct of parliamentary elections led to the ousting of President Eduard Shevardnadze⁴; Ukraine's "Orange Revolution" in 2004 where large public demonstrations forced the re-running of the Presidential election and the eventual election of Viktor Yushchenko (who had been poisoned during the first election campaign)⁵ and the numerous changes of governments in States belonging to the Eurozone who have experienced severe financial crises (including the appointment of

¹ A. Mowbray, "The Role of the European Court of Human Rights in the Promotion of Democracy", [1999] *Public Law* 703.

² *United Communist Party of Turkey v Turkey*, No. 19392, 30 Jan. 1998 para. 43.

³ *Ibid.*, para. 44.

⁴ BBC News Europe, Georgia Profile and for subsequent litigation at Strasbourg see *infra* n.68.

⁵ BBC News Europe, Ukraine Profile.

an Italian cabinet composed entirely of technocratic, non-politicians⁶). Alongside these momentous events the widening of access to the Court for aggrieved complainants introduced, from late 1998, by Protocol 11⁷ has meant that the Court has faced an ever expanding range of litigation involving various aspects of democracy. Therefore, I will now seek to explore some of the fundamental themes in this new case-law.

Freedom of expression

Recent jurisprudence has recognised the crucial role played by non-governmental organisations (NGOs) in contributing to the public debate about matters of policy. In *Tarsasag a Szabadságjogokért v Hungary*⁸, the applicant association (the Hungarian Civil Liberties Union) had the general aim of promoting fundamental rights and one specific area of its work concerned drugs policy. In March 2004 a Member of Parliament (MP), together with others, lodged a complaint with the Constitutional Court seeking the review of recent changes to the Criminal Code applying to drugs offences. Subsequently, the MP gave a press interview about his complaint. The applicant association requested the Constitutional Court to provide the association with access to the complaint. The Constitutional Court replied that it could not do so without the approval of the MP. Some months later the Constitutional Court delivered a public decision on the lawfulness of the amendments to the Criminal Code which summarised the complaint. Before the Strasbourg Court the association contended that it had suffered a breach of Article 10 of the ECHR as it had been prevented from receiving information of public interest. Furthermore, the association submitted that it played a role analogous to the media in facilitating public understanding of politicians' views on drugs policy. The Chamber, unanimously, held that:

...The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs (see, for example, *Steel and Morris v. the United Kingdom* (no. 68416/01, § 89, ECHR 2005-II). The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog" (see *Riolo v. Italy*, no. 42211/07, § 63, 17 July 2008; *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 42, 27 May 2004). In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press.⁹

⁶ "Italian Prime Minister unveils new cabinet, devoid of politicians", BBC News, 16 Nov. 2011. In the subsequent February 2013 general election a party led by a former comic, Beppe Grillo, won a quarter of the votes cast. Two months later a grand coalition of other parties formed a government.

⁷ See, A. Mowbray, *Cases, Materials & Commentary on the ECHR 3rd ed*, (Oxford: Oxford University Press, 2012) 13.

⁸ No. 37374/05, 14 Apr. 2009.

⁹ *Ibid.*, para. 27.

Given that the association was engaged "in the legitimate gathering of information on a matter of public importance"¹⁰ the Chamber found that the Constitutional Court's monopoly of information constituted a form of censorship that interfered with the association's rights under Article 10(1). The government then claimed that interference could be justified as being necessary to protect the MP's rights in accordance with Article 10(2). The Chamber applied its "careful scrutiny"¹¹ approach to examining interferences with the freedom of expression of social watchdogs.

...the Court finds it quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint. It is true that he had informed the press that he had lodged the complaint, and therefore his opinion on this public matter could, in principle, be identified with his person. However, the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent. These considerations cannot justify, in the Court's view, the interference of which complaint is made in the present case.¹²

Therefore, the Chamber determined that the association had suffered a violation of Article 10.

The above judgment reveals the Court acknowledging an expanding range of organisations and bodies play important roles in formulating and disseminating ideas and information on topics of public debate in democratic societies. Whilst the original Court had given protection to political parties campaigning on sensitive topics. "It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided they do not harm democracy itself."¹³ The media had been accorded a special role, and a commensurate degree of protection, even earlier in the original Court's case-law. "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders."¹⁴ Now, the contemporary Court has granted the same level of protection the media enjoy, under Article 10, to NGOs where they are seeking to contribute to public policymaking debates.

Another issue for the Court in recent times has been how Article 10 should be applied to the display of contentious political symbols. In *Vajnai v Hungary*¹⁵, the applicant was the Vice-President of the, registered, left-wing Workers' Party. During 2003, he spoke at a lawful demonstration, held on the spot where a statue of Karl Marx had been located during Communist times. Vajnai wore a 5 cm diameter five-pointed red star on his jacket. Police officers who were present at the demonstration required him to remove the symbol and he complied. Under the Criminal Code it was an offence to "exhibit a swastika, an SS-badge, an arrow-cross"¹⁶, a symbol of the sickle and hammer

¹⁰ *Ibid.*, para. 28.

¹¹ *Ibid.*, para. 26.

¹² *Ibid.*, para. 37.

¹³ *The Socialist Party v Turkey*, No. 21237/93, 25 May 1998.

¹⁴ *Lingens v Austria*, No.9815/82, 13 Dec. 1986.

¹⁵ No. 33629/06, 8 Jul. 2008.

¹⁶ For more related Strasbourg litigation see *infra* n. 27.

or a red star, or a symbol depicting any of them"¹⁷. He was later convicted, but the District Court refrained from imposing a sanction for a probationary period of one year. Vajnai appealed to the Regional Court which sought a preliminary ruling from the Court of Justice in Luxembourg. The latter determined that it had no jurisdiction over the matter as Vajnai's circumstance fell outside the scope of Community law. Subsequently, the Regional Court confirmed his conviction.

Before the Strasbourg Court Vajnai claimed the conviction had interfered with his freedom of expression. The government's first defence was to try and argue his application was inadmissible under Article 17 of the ECHR¹⁸. In the view of the government the red star represented totalitarian notions that were contrary to the values of the Convention and displaying the symbol was disdainful towards the victims of the former Communist regime. The united Chamber rejected the government's argument because the applicant did not belong to a party with totalitarian goals nor had he expressed contempt for the victims of a dictatorial regime. Turning to the substance of the applicant's complaint, the Chamber found that the conviction amounted to an interference with Vajnai's freedom of expression. However, the government submitted that it could be justified, under Article 10(2), as being necessary for the prevention of disorder and the protection of the rights of others, due to the fear or indignation caused to other citizens by the display of totalitarian symbols. The Chamber accepted the conviction could be viewed as promoting those legitimate aims. As to whether the interference was "necessary in a democratic society" Vajnai contended that the red star symbol did not only represent Communist dictatorship. For over a century, he argued, the symbol reflected the liberation of workers and socialism. Hungary had been freed from the Nazis by Soviet military personnel wearing the symbol. Moreover, Hungary was the only Member State that criminalised the public display of the red star. In his view this law undermined pluralism and inhibited left-wing politicians from expressing their beliefs. The government responded that modern history meant that in Hungary the symbol was identified with Communist dictatorships.

The Chamber held that:

...there is little scope under Article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest... In the instant case, the applicant's decision to wear a red star in public must be regarded as his way of expressing his political views. The display of vestimentary symbols falls within the ambit of Article 10.¹⁹

Furthermore:

...utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings. In such situations, the Court perceives a risk that a blanket ban on such symbols may also restrict their use in contexts in which no restriction would be justified.²⁰

In the view of the Chamber the red star symbol did not only represent Communist totalitarianism but also the international workers' movement and lawful political parties in various Member States. Hence, the circumstances in which the symbol was displayed was a crucial factor. In the applicant's case he was a leader of a registered political party speaking at a lawful and peaceful demonstration. Although the Court recognised that

¹⁷ Crimes against Public Tranquillity- The use of totalitarian symbols: Section 269/B.

¹⁸ "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

¹⁹ *Supra* n.15, para. 47.

²⁰ *Ibid.*, para. 51.

victims and their relatives of the "systematic terror"²¹ used by Communist regimes in Europe might consider the display of the red star symbol disrespectful.

Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.²²

Therefore, as the applicant had been subject to a criminal sanction for wearing the red star symbol the Chamber found that to be a disproportionate interference which breached Article 10.

The unanimous judgment in *Vajnai* disclosed the Court extending its well-established strong protection of political expression to highly sensitive political symbols worn in public locations. States will, therefore, face a heavy burden to justify lawful restrictions on the display of such symbols, especially where the particular symbol has a variety of connotations. An example of a later complaint where the State was able to meet this burden occurred in *Christopher Donaldson v UK*²³. The applicant was a convicted prisoner who was serving his sentence in a segregated wing (for republican prisoners) of Maghaberry Prison in Northern Ireland. Prison Orders stated that prisoners in Northern Ireland were not allowed to wear emblems when outside their cells (except for wearing the shamrock on St. Patrick's Day and poppies on Remembrance Day as these were deemed to be non-political/non-sectarian). The Northern Ireland Equality Commission had issued guidance to employers which identified, *inter alia*, Easter lilies and Orange symbols as emblems linked to community conflict in the Province that had the potential to cause disharmony amongst persons of a different identity. On Easter Sunday in 2008 the applicant attached an Easter lily to his outer clothing (to commemorate the Irish republicans who were killed or executed during the failed Easter Rising in 1916). A prison officer required him to remove the lily and when Donaldson refused he was charged with the disciplinary offence of failing to obey a lawful order. He was found guilty of the disciplinary offence and given three days' cellular confinement as punishment. Subsequently, Donaldson unsuccessfully sought to challenge the prison service policy regarding the wearing of the Easter lily. The Court of Appeal in Northern Ireland rejected his challenge finding, in the light of the Equality Commission's guidance, that such conflict emblems had no place in working environments, which included prisons. Furthermore, the applicant had suffered a minimal interference with his freedom of expression as he could wear the emblem in his cell.

In his complaint to the Court Donaldson alleged that the ban on wearing the Easter lily outside his cell violated his freedom to express his political views. Following *Vajnai* the Chamber accepted that the applicant wearing the Easter lily was a form of political expression. As to whether the restriction and punishment imposed on the applicant was justifiable, under Article 10(2), to prevent disorder in the prison:

The Court recognises that in the present case the significance of the Easter lily will be relevant to any assessment of the necessity of the interference. It notes that in Northern Ireland many emblems are not simply an expression of cultural or political identity but are also inextricably linked to the conflict and can be viewed as threatening and/or discriminatory by those of a different cultural, political or religious background. Consequently, the public display of emblems can be inherently divisive and has frequently exacerbated existing tensions in Northern

²¹ *Ibid.*, para. 57.

²² *Ibid.*

²³ No. 56975/09, Decision 25 Jan. 2011.

Ireland. Therefore, as cultural and political emblems may have many levels of meaning which can only fully be understood by persons with a full understanding of their historical background, the Court accepts that Contracting States must enjoy a wide margin of appreciation in assessing which emblems could potentially inflame existing tensions if displayed publicly.²⁴

The Chamber noted the Equality Commission's guidance regarding the wearing of the Easter lily. Furthermore, the Chamber believed, "that in times of conflict, prisons are characterised by an acute risk of disorder and emblems which are more likely to be considered offensive are also more likely to spark violence and disorder if worn publicly."²⁵ So the applicant's desire to wear a contentious political emblem in a Northern Irish prison could be distinguished from the situation in *Vajnai*, where there was no risk of disorder being provoked by his display of the red star. Also, the interference with the applicant's freedom of expression was limited, as he was not prevented from wearing the lily in his cell. The Chamber went on to find that where paramilitary prisoners were detained in Northern Irish integrated prisons the ban was proportionate as the prisoners routinely came into contact with their opponents and even in segregated prisons there were places, like visiting halls, where prisoners from opposing groups met. The authorities' desire to protect prison service staff from being threatened by conflict emblems was another relevant factor. Consequently, a majority²⁶ of the Chamber ruled that the minor interference with the applicant's freedom of expression was a proportionate limitation and his application was manifestly ill-founded.

Beyond the significance of the decision in *Donaldson* for seeking to reduce tensions within prisons in Northern Ireland, the ruling of the Chamber is legally fascinating because of the wide margin of appreciation granted to Member States to determine which specific emblems should be banned from public display in their societies. The Chamber expressly acknowledged the importance of historical knowledge when reaching such decisions. In *Donaldson* the government had been able to invoke the expert and impartial guidance from the Equality Commission to underpin the justification the restrictions applying to the applicant and other prisoners in Northern Ireland.

The public display of a lawful, but contentious, flag was at the heart of the complaint in *Faber v Hungary*²⁷. During May 2007 the Hungarian Socialist Party ("MSZP") organised a demonstration in Budapest to campaign against racism. Members of a right-wing party ("Jobbik") held a simultaneous counter-demonstration nearby. During the demonstrations the applicant, situated at a place where in the final year of the Second World War the Hungarian Arrow Cross regime exterminated many people and only a few metres away from the Jobbik demonstration, silently held up an Arpad flag²⁸. At that time Hungarian legislation listed the Arpad flag as one of the country's historical banners, but visually it closely resembled the flag of the Arrow Cross regime. Some of the bystanders called the applicant and fellow supporters "fascists" and "arrow-crossers". The police officers on duty at the demonstrations had been ordered not to allow anyone to display the Arpad flag within 100 metres of the Socialist Party demonstration. Accordingly, officers asked Faber to remove the flag or leave the scene. He refused and was arrested. Later he was fined roughly 200 euros by the police for the regulatory offence of disobeying police instructions. His appeal to the District Court was rejected as that court considered the display of the flag to be offensive.

²⁴ *Ibid.*, para. 28.

²⁵ *Ibid.*, para. 29.

²⁶ Comprising an unspecified number of Judges as it was an admissibility decision.

²⁷ No. 40721/08, 24 Jul. 2012.

²⁸ Judge Pinto de Albuquerque provided a detailed history of this flag in his Concurring Opinion.

Faber lodged a complaint at Strasbourg alleging breaches of Article 10 and 11 as the Arpad flag was not a prohibited symbol in Hungary. The government responded that the display of the flag by the applicant was irritating to other persons and therefore the police had acted to prevent disorder and protect the rights of others. The majority of the Chamber determined that:

The applicant's decision to display that flag in the vicinity of the MSZP demonstration must be regarded as his way of expressing – by way of a symbol – his political views, namely a disagreement with the ideas of the MSZP demonstrators. The display was perceived as the expression of a political opinion by the demonstrators, who identified the applicant as being a "fascist".²⁹

Following *Vajnai* where a symbol had various connotations the Court had to closely examine the context in which the display occurred. In the assessment of the majority:

The demonstration organised by MSZP was located at a site laden with the fearful memory of the extermination of Jews and was intended to combat racism and intolerance; the choice of the venue appears to be directly related to the aims of the demonstration. However, even assuming that some demonstrators may have considered the flag as offensive, shocking, or even "fascist", for the Court, its mere display was not capable of disturbing public order or hampering the exercise of the demonstrators' right to assemble as it was neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons... The Court stresses that ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need for the purposes of Article 10(2), especially in view of the fact that the flag in question has never been outlawed.

...
The Court does not exclude that the display of a contextually ambiguous symbol at the specific site of mass murders may in certain circumstances express identification with the perpetrators of those crimes; it is for this reason that even otherwise protected expression is not equally permissible in all places and all times. In certain countries with a traumatic historical experience comparable to that of Hungary, a ban on demonstrations – to be held on a specific day of remembrance – which are offensive to the memory of the victims of totalitarianism who perished at a given site may be considered to represent a pressing social need. The need to protect the rights to honour of the murdered and the piety rights of their relatives may necessitate an interference with the right to freedom of expression, and it might be legitimate when the particular place and time of the otherwise protected expression unequivocally changes the meaning of a certain display. Similar considerations apply if the expression, because of its timing and place, amounts to the glorification of war crimes, crimes against humanity or genocide... Moreover, where the applicant expresses contempt for the victims of a totalitarian regime as such, this may amount – in application of Article 17 of the Convention – to an abuse of Convention rights...³⁰

But there was no evidence that the applicant had such impermissible aims. Therefore, the majority concluded that he had suffered a violation of Article 10, read in the light of Article 11.

Judge Keller reached the opposite conclusion:

What message (in addition to that already expressed by the *Jobbik* demonstration) other than a racist and fascist one could be conveyed by a flag that is associated in public opinion with the 1944/45 Nazi Regime in Hungary and is raised at a place

²⁹ *Supra* n. 27, para. 52.

³⁰ *Ibid.*, at paras. 56 and 58.

where grave human rights violations were committed during the Second World War? In the light of Article 17 of the Convention..., I have serious doubts as to whether the expression of such an opinion could attract the protection of the Article 10.

...

However, even assuming that the display of the Arpad-striped flag at that very place and at the very moment could have expressed a message that falls within the ambit of Article 10, I am convinced that it is not for the Court to decide on the disputed nature of this historical symbol. The case at hand is a telling example, showing that the interpretative meaning of a symbol may vary according to the place, the time and the historical context. These elements are best assessed by the national authorities. . .³¹

So, without expressly referring to *Donaldson*, Judge Keller favoured the Court deferring to domestic determinations of the specific meaning of an ambiguous political symbol displayed in a particular context. Judges Popovic and Berro-Lefevre believed that they were bound by *Vajnai*:

The reasoning which provides ground for such an approach is simple: if a left wing political symbol is allowed, irrespective of the consequences that its exposing may produce, then a right wing symbol should be allowed as well.³²

The above cases reveal that the Court has been highly protective of individuals' right to publicly display controversial political symbols. Generally, the Court has only been willing to endorse domestic restrictions on the display of such symbols where there are strong grounds to believe that either public disorder will be provoked or the display is clearly signifying support for anti-Convention values (e.g. endorsing genocide). Where the Court needs to develop and clarify its jurisprudence is regarding the breath of the margin of appreciation it accords to States to determine the meaning of symbols that have multiple connotations. The approach of the Chamber in *Donaldson* and Judge Keller in *Faber* has much to favour it as the Strasbourg Court is not well placed to know the nuances of particular symbols. The Court should be especially deferential to national assessments where they have been made by independent and expert bodies (like the Northern Ireland Equality Commission's view of the Easter lily in *Donaldson*).

A related theme in the Court's recent case-law has dealt with symbolic activities expressing a political view. In *Women on Waves and others v Portugal*³³, the first applicant was Dutch foundation and the other two applicants were Portuguese associations. All the applicants were engaged in encouraging public debate on reproductive rights. In 2004 the first applicant, in response to invitations from the Portuguese applicants, chartered a ship and planned to sail into Portuguese territorial waters to campaign for the decriminalisation of abortion. Similar events had been organised by the first applicant in other European States. However, the Portuguese government issued an order, based on national maritime and health laws, banning the first applicant's ship from entering Portuguese territorial waters. A Portuguese warship was dispatched to block the first applicant's ship from entering Portuguese waters. The domestic courts rejected the applicants' claim for judicial review of the government's ban. The Administrative Court ruled that the applicants appeared to be intending to provide Portuguese women with access to illegal abortion medicines and procedures.

³¹ Dissenting Opinion of Judge Keller, paras. 12 and 14.

³² Concurring Opinion of Judge Popovic joined by Judge Berro-Lefevre.

³³ No. 31276/05, 3 Feb. 2009.

The Strasbourg Court held that Article 10(1) guaranteed freedom to choose the form in which ideas were conveyed and this was particularly important for symbolic types of protest. The use of the chartered ship was a key aspect of the applicants' planned activities. Whilst the Court also accepted the government's claims that they had intervened in the applicants' planned events in order to prevent disorder and protect health, the Court reiterated that pluralism and tolerance of shocking and disturbing ideas were prerequisites for democratic societies. The Court found a lack of convincing evidence that the applicants intended to violate Portuguese abortion law and the deployment of a warship was a radical act to deter the applicants' freedom of expression. Consequently, the unanimous Chamber concluded that the authorities' interference had been disproportionate and breached Article 10.

This was another robust defence of political expression by the Court that applied the Convention's guarantee to the method by which the political message was sought to be proclaimed by the campaigners. An equally protective stance was adopted by the Court in the later case of *Tatar and Faber v Hungary*³⁴. The applicants (the second of who was also the holder of the Arpad flag/complainant in the case discussed above³⁵) held what they described as a "political performance" for 13 minutes outside the national Parliament one day in February 2007. During that time the applicants tied a piece of rope, with several items of dirty clothing attached to the rope, on the fence surrounding the Parliament building. They claimed that the "performance" had the symbolic meaning of hanging out the nation's dirty laundry and was motivated by the political crisis in the country. They had advertised the event on their website, but had not invited any members of the public to join them. A few journalists turned up for the event and the applicants answered the questions put to them by the media representatives. The applicants left the event of their own will. Subsequently, the police fined each applicant roughly 250 euros for failing to comply with the legal duty to notify the police of an assembly three days in advance of the gathering. The District Court upheld the fine as it concluded the applicants had advertised their event so it fell within the notification obligation.

Before the Strasbourg Court the applicants claimed they had suffered a violation of their right to freedom of expression under Article 10, whilst the government argued that the case did not concern that right, but involved Article 11 (freedom of assembly). In the government's submission it was justifiable, under Article 11, to require the organisers of public assemblies to give advance notification to the authorities so that the latter could take appropriate measure to maintain public order. Furthermore, the Council of Europe's expert group, the European Commission for Democracy through Law (commonly referred to as the "Venice Commission"), had issued Guidelines on Freedom of Peaceful Assembly³⁶ that stated an assembly required at least two persons. However, the Chamber (unanimously) ruled that the applicants' action, "which the applicants describe as a "performance"- amounts to a form of political expression."³⁷ The Chamber

³⁴ Nos. 26005/08 and 26160/08, 12 Jun. 2012.

³⁵ *Supra* n.27.

³⁶ Venice, 4 Jun 2010.

³⁷ *Supra* n. 34 para. 36.

disagreed with the government's characterisation of the event as an assembly. The Chamber held that the term "assembly" in Article 11 should be given an autonomous meaning, *i.e.* it was for the Court to define such events.

The Court considers that, in qualifying a gathering of several people as an assembly, regard must be had to the fact that an assembly constitutes a specific form of communication of ideas, where the gathering of an indeterminate number of persons with the identifiable intention of being part of the communicative process can be in itself an intensive expression of an idea. The support for the idea in question is being expressed through the very presence of a group of people, particularly – as in the present case – at a place accessible to the general public. Furthermore, an assembly may serve the exchange of ideas between the speakers and the participants, intentionally present, even if they disagree with the speakers.³⁸

In the judgment of the Chamber the applicants had not sought to attract participants to their event. The Venice Commission Guidelines could not be read as meaning that every expressive action of two individuals constituted an assembly. The Chamber considered that the applicants' "political performance" was aimed at conveying a message via the media, rather than gathering people to receive the views of the applicants. Applying the Court's established jurisprudence regarding interferences with political expression, the Chamber found that the sanctions impose on the applicants were not justifiable under Article 10(2) and therefore a breach of that Article had occurred.

So events in public through which the organisers intend to convey a political message will be evaluated by the Court in terms of Article 10, rather than Article 11, where the organisers have not sought to attract other persons to join them. Given the location of the applicants' "performance" and the obvious content of the message being conveyed by their actions it would be hard to dispute that it amounted to an act of political expression. The judgment is also valuable for the Court's elaboration of the meaning of an "assembly" under Article 11.

As we have observed above³⁹ the original Court saw the media as having a crucial role in providing the public with information and comment about the political life of their societies. In a momentous judgment the contemporary Court elaborated the obligations arising from Article 10 on Member States to secure coverage of the breadth of political views existing within their countries by the audiovisual media. The nine applicants in *Manole and others v Moldova*⁴⁰, were current or former journalist employed by Teleradio-Moldova ("TRM"), which in the early years of the present century was a public company which dominated radio and television broadcasting in Moldova. The applicants contended that from February 2001, when the Communist Party won the general election, the new government sought to control TRM's coverage of political and public life in the country. Senior managers at TRM were replaced by supporters of the government, two-thirds of news broadcasts were devoted to pro-government reports, opposition politicians were denied access to TRM broadcasts and specified topics/words were banned from TRM programmes (including the Stalinist regime and "totalitarian regime"). In the submission

³⁸ *Ibid.*, para. 38.

³⁹ *Supra* n.14.

⁴⁰ No. 13936/02, 17 Sep. 2009.

of the applicants these actions, amounting to an administrative practice, of the government violated Article 10.

The unanimous Chamber began by repeating the, “fundamental truism: there can be no democracy without pluralism.”⁴¹ Furthermore, States were not only subject to negative duties under Article 10, they were also obliged to take positive measures to protect freedom of expression as “the State must be the ultimate guarantor of pluralism”.⁴² In the context of the audiovisual media:

...the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment.⁴³

The Convention did not require States to establish public service broadcasting networks, but where such systems were created:

...domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.⁴⁴

The Chamber found that, during the relevant period, TRM’s broadcasts displayed a “significant bias” in favour of the government, with “insufficient” coverage of opposition parties and a policy of limiting coverage of specified topics. The legislative framework regulating TRM failed to provide adequate safeguards against the government controlling the broadcaster’s senior personnel and its editorial policy. Therefore, the respondent State had not complied with its positive obligations under Article 10.

The judgment in *Manole* represents a major refinement of the obligations upon Member States to ensure the public have access to balanced coverage of political issues in the most popular forms of the media. Clearly, without such coverage the public are unable to effectively exercise their democratic rights as they will be inhibited in their comprehension of the benefits and disadvantages of the various programmes offered by different political parties. Independent reporting of the actions of government is also essential if electoral rights are to be exercised on the basis of accurate assessments of the achievements and failings of those currently in office. The events in *Manole* revealed a horrifying abuse of media power by the governing party.

A much more divisive issue for the Court has been the restrictions that national legislation can place on television and radio political advertising. A Grand Chamber was almost evenly split on the application of Article 10 to a general ban of such advertising in

⁴¹ *Ibid.*, para. 95.

⁴² *Ibid.*, para. 99.

⁴³ *Ibid.*, para. 100.

⁴⁴ *Ibid.*, para. 101.

*Animal Defenders International v UK*⁴⁵. The applicant NGO campaigns against the use of animals in science, commerce and leisure. In 2005 it sought permission to broadcast a paid advertisement on television, showing an animal cage in which a girl in chains appears, as part of its campaign "My Mate's a Primate" (seeking the ending of the keeping and exhibiting of primates). In accordance with the Communications Act 2003, which prohibits political advertisements (defined widely to encompass, *inter alia*, adverts by political bodies and adverts seeking to alter the law/policies of government) on television and radio, the broadcasting authorities refused to transmit the advert. Subsequently, the High Court and the House of Lords (unanimously) rejected the applicant's claim for judicial review. The domestic judges noted that Parliament had devoted great attention to the effect of Article 10 when it had confirmed the well-established general ban in 2003. After failing before the domestic courts the applicant lodged a complaint at Strasbourg. Subsequently, the Chamber relinquished jurisdiction to the Grand Chamber.

The dispute between the parties focussed on whether the banning of the advert was "necessary in a democratic society". In the submission of the applicant the 2003 legislation imposed a disproportionately wide ban that had very negative effects on "social advocacy groups" wishing to campaign on public interest issues outside of pre-election periods. Great reliance was placed on the Chamber judgment in *VgT v Switzerland*⁴⁶, where the banning of a television advert by another pro-animals NGO was found to have violated Article 10. In reply the government contended that Parliament had sought to protect the democratic process from being distorted by wealthy advertisers and there was no consensus on the regulation of political advertising amongst Member States. Furthermore, *VgT* should either be limited to its own facts or not be followed.

A bare majority of the Grand Chamber (nine judges) accorded significant weight to the "exacting and pertinent reviews"⁴⁷ undertaken by both the British Parliament and courts of the legislative ban on political adverts (which had been in existence for over fifty years and had received cross-party endorsement during the enactment of the 2003 Act). Furthermore, the ban was specifically directed at the most influential/expensive forms of media. The majority noted that:

[s]uch is the lack of consensus in this area that the Committee of Ministers of the Council of Europe, in considering the issue of paid political advertising in the broadcast media in 1999 and 2007, declined to recommend a common position on the issue. This lack of consensus also broadens the margin of appreciation to be accorded as regards restrictions on public interest expression.⁴⁸

Consequently, the majority did not believe that the applicant had suffered a disproportionate restriction of its freedom of expression.

In contrast Judges Ziemele, Sajo, Kalaydjyeva, Vucinic and De Gaton emphasised that; "...the prohibition applied to the most protected form of expression (public interest speech), by one of the most important actors in the democratic process (an NGO) and on one of the most influential media (broadcasting)."⁴⁹ Interestingly, especially given that these dissenters came predominantly from new democracies, they concluded:

⁴⁵ No. 48876/08, 22 Apr. 2013.

⁴⁶ No. 24699/94, 28 Jun. 2001 and for my commentary on the second stage of this litigation see 16 *Eur. Pub. L.* 512 (2010).

⁴⁷ *Supra* n. 45 para. 116.

⁴⁸ *Ibid.*, para. 123.

⁴⁹ Joint Dissenting Opinion at para.2.

Nothing has been shown in this case to suggest that the state of democracy in the United Kingdom requires, by way of a “pressing need”, the wide ban on paid “political” advertisements that is in issue here; or that the said democracy is less robust than in other States parties to the Convention and cannot afford risk-taking with “issue-advertising”. On the contrary, tradition and history force one to assert the very opposite.”⁵⁰

In their joint dissent Judges Tulkens, Spielmann and Laffranque criticised the UK’s general ban for failing to take account of the identity of the would-be advertiser or the content of the desired advertisement.

The dissenting opinions in *Animal Defenders International* reflect one of the underlying themes in the contemporary Strasbourg jurisprudence on democracy that NGOs are now seen as key bodies in the operation of effective democracies. That can also be observed in the domestic legislation, which as we have noted, applied to both (traditional) political parties and other bodies having a political goal. Given the slim size of the majority in the above judgment it may well be that in future years the Court will reduce the breadth of the margin of appreciation granted to States regarding limitations of political adverts by NGOs, particularly if the consensus amongst Member States shifts against complete bans on such advertisements.

Freedom of association

Just as the original Court adopted a highly protective stance towards the freedom of association to be enjoyed by political parties, because of their central importance for the proper functioning of democratic societies, with the consequence that States only had a “limited margin of appreciation” to justify dissolving these organisations under ECHR Article 11(2)⁵¹; now the Court has adopted a similar stance towards NGOs. The first applicant in *Tebietî Muhafîze Cemiyeti (TMC) and Israfilov v Azerbaijan*⁵², was a former NGO which campaigned for a cleaner environment in the respondent State. The second applicant had been chairman of the first applicant. TMC had acquired legal status when it registered with the Ministry of Justice in 1995. During August 2002 the Ministry conducted an inspection of TMC and that resulted in a warning letter being sent to TMC in which the Ministry stated that the association was in breach of its own charter and national legislation by not having held a general assembly of its members. The second applicant replied that a general assembly had been held a few weeks previously. In response the Ministry sent another warning letter claiming that, *inter alia*, the general assembly had been held in violation of domestic legal requirements (including failure to notify all the association’s members). TMC, disputed those assertions, but it did not reply to the Ministry. In December 2002 the Ministry applied for the judicial dissolution of TMC and the District Court so ordered, after a hearing, finding, *inter alia*, that TMC had breached its own charter and national legal requirements governing the holding of general assemblies. Ultimately, the Supreme Court confirmed the dissolution of TMC.

The applicants complained to Strasbourg arguing that the dissolution of TMC had breached their right to freedom of association guaranteed by Article 11. The united Chamber held that:

⁵⁰ *Ibid.*, at para. 15.

⁵¹ *Supra* n.2 para. 46.

⁵² No. 37083/03, 8 Oct. 2009.

While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively...⁵³

Consequently, the Chamber utilised exactly the same language as in the Court's early political party dissolution jurisprudence to determine that the respondent State only had a "limited margin of appreciation"⁵⁴ when deciding if it was necessary in a democratic society to dissolve TMC to protect the rights/freedoms of others. Whilst the Chamber was critical of TMC's "wanton disregard" of its own charter and national law in failing to hold a general assembly for nearly seven years; "[t]he Court sees little justification for the Ministry of Justice to interfere with the internal workings of the Association to such an extent, especially in the absence of any complaints by Association members concerning these matters."⁵⁵ Furthermore, the sanction of dissolution was disproportionate. "The Court considers that a mere failure to respect certain legal requirements on internal management of NGOs cannot be considered such serious misconduct as to warrant outright dissolution."⁵⁶ Therefore, the Chamber concluded that a breach of Article 11 had occurred and awarded TMC 8,000 euros just satisfaction for the non-pecuniary damage the founders and members of the association had suffered due to the dissolution of the organisation.

Although the judgment in *TMC* did not refer to *Tarsasag*⁵⁷ there is a symmetry in the case-law as the Court was taking-account of the roles played by NGOs in campaigning on single policy issues (whereas traditional political parties generally offer wide manifestos encompassing the full spectrum of governmental responsibilities) and in promoting public debate on topics of general interest. Both these activities, which will often be combined by particular NGOs, contribute to fostering active and healthy civil societies which the Court recognised as essential components in modern democracies. Therefore, under both Articles 10 and 11 of the ECHR States are required to establish strong grounds to justify interfering with the activities of NGOs that are contributing towards the enhancement of democracy.

An example of where a State was able to justify banning an association because the latter's activities were contrary to the values of the ECHR occurred in *Hizb Ut-Tahir*

⁵³ *Ibid.*, para. 53.

⁵⁴ *Ibid.*, para. 67.

⁵⁵ *Ibid.*, para. 78.

⁵⁶ *Ibid.*, para. 82.

⁵⁷ *Supra* n.8.

(HU-T) *and others v Germany*⁵⁸. The first applicant was an unincorporated association, which did not disclose an address to the Court, the second applicant was the association's representative for the proceedings before the Court (he was an Austrian national living in Germany) and the other 15 applicants were members/supporters of HU-T living in Germany and Romania. HU-T ("Liberation Party") defines itself as a global Islamic political party and/or religious society. It was created in Jerusalem in 1953 and it campaigns for the replacement of governments in Muslim countries with an Islamic State having the form of a Caliphate. HU-T had been active in Germany from the 1960s and about 200 persons were followers of the association at the time of this litigation. In January 2003 the German Federal Ministry of the Interior decided to proscribe HU-T within that country and confiscate the association's assets. HU-T's main activities in Germany were the distribution of a quarterly magazine ("Explizit"), brochures and the organisation of public events. The Ministry considered that HU-T's activities were contrary to national law because the association campaigned against the principle of international understanding and advocated the use of violence to achieve its aims. According to the Ministry publications by HU-T, *inter alia*, denied the right of the State of Israel to exist and urged its destruction together with the killing of Jews. In the opinion of the Ministry HU-T was neither a political party, as it did not seek to contest elections in Germany, nor a religious/philosophical community, as the association did not pursue religious objectives. The applicants challenged the Ministry's decision before the Federal Administrative Court. The association submitted that as it was banned in all Arab States it had to operate clandestinely and therefore it could not reveal its address. Having regard to various publications by HU-T the Administrative Court determined that the prohibition of the association by the Ministry was a proportionate response. Subsequently, the Federal Constitutional Court refused to accept the association's constitutional complaint as HU-T did not have a registered address in Germany.

In their complaint at Strasbourg the applicants contended, *inter alia*, that the Ministry's ban breached their right to freedom of association. The government responded that HU-T's activities amounted to an abuse of Convention rights and thus were not protected in accordance with ECHR Article 17. Noting the Administrative Court's judgment and public statements by the second applicant justifying the killing of civilians in suicide attacks within Israel (which neither the first or second applicants sought to distance themselves from during the Strasbourg proceedings), the Chamber determined that:

...the first applicant attempts to deflect Article 11 of the Convention from its real purpose by employing this right for ends which are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life. Consequently, the Court finds that, by reason of Article 17 of the Convention, the first applicant may not benefit from the protection afforded by Article 11 of the Convention.⁵⁹

Therefore, by an undisclosed majority, the Chamber declared the application inadmissible.

⁵⁸ No. 31098/08, 12 Jun. 2012.

⁵⁹ *Ibid.*, para. 74.

Presumably the German authorities had not sought to formally dissolve HU-T as it was not a legal person nor did it have an identified address in that country. Regarding the dissolution of political parties an illuminating study by Dr Olgun Akbulut has revealed that the Court has determined a dozen cases since its classic judgment in *United Communist Party of Turkey*⁶⁰. The Court's protective attitude towards these organisations has resulted in the vast majority of the cases (nine) ending with a finding of a breach of Article 11.⁶¹ However, his analysis disclosed that where political parties had proven links with terrorist groups or advocated anti-secular policies they were not protected by the ECHR. Philosophers have also addressed the question whether it is permissible for liberal democratic States to restrict the political rights of anti-liberal democratic organisations. Kristian Skagen Ekeli has recently written that in principle it can be justifiable for such organisations to be denied political rights, including the right to form political parties, in accordance with arguments based either on "precautionary self-defence" or "from the foundation of liberal democratic rights".⁶² The first argument contends that liberal democratic states:

...should not place the political means of their own destruction in the hands of those who wish to undermine or destroy liberal democratic institutions and repress people with competing political doctrines and other conceptions of the good by means of the coercive powers of the state or violence. The liberal democratic state is not a suicide pact, and it should introduce certain precautionary measures of self-defence the aim of which is to sustain a liberal democratic order that respects the freedom and equal moral status of persons.⁶³

The second argument permits the limitation of political rights to groups that use or attempt to use these rights in conflict with "the core foundation of liberal democratic rights and institutions".⁶⁴ Ekeli elaborates the core as including persons being able to communicate their political and religious ideas to others and institutional safeguards against the oppressive use of governmental powers. However, he considers that "ripe democracies", those with an established constitutional democratic culture⁶⁵, should exercise caution in limiting political rights to these groups. The ECHR enables Member States to take such draconian measures, like prohibiting the activities of particular groups, but the above case-law confirms that the Court requires convincing evidence that the relevant group is a danger to the Convention's concept of a democratic society. So we can detect a parallel between philosophical thought on the preservation of liberal democratic states and the Court's application of Article 11.

⁶⁰ *Supra* n.2.

⁶¹ O. Akbulut, "Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties", 34 (2010-11) *Fordham Int'l L.J.* 46 at p. 47.

⁶² K.S. Ekeli, "The Political Rights of Anti-Liberal-Democratic Groups", (2012) *Law and Philosophy* 269.

⁶³ *Ibid.*, p.279.

⁶⁴ *Ibid.*, p.282.

⁶⁵ *Ibid.*, p.290.

Right to free elections

There has been a burgeoning in the case-law involving Article 3 of Protocol No. 1 (hereinafter P1-3) during the present century, much of it driven by complaints regarding election processes in the newer democracies.⁶⁶ However, as we shall examine below, some of the most contentious recent judgments of the Court have also involved Member States with ripe democratic systems. Indeed, the quantity and complexity of the Court's jurisprudence regarding P1-3 has resulted in the Press Unit issuing a non-exhaustive eight page Factsheet on this case-law.⁶⁷ We shall focus our attention on a selection of the contemporary judgments.

Regarding complaints about electoral arrangements in the (very) new democracies *The Georgian Labour Party v Georgia*⁶⁸, is a highly dramatic example. The applicant political party made a number of complaints, alleging breaches of P1-3, about the conduct of the general election held a few months after the "Rose Revolution" in that country. A system of active voter registration was introduced, which required voters to check that their names were on electoral rolls and file a petition if they had been omitted. A few weeks later, on 28 March 2004, the general election was held. On 2 April 2004 the Central Electoral Commission annulled the election results in two areas (in the "Ajarian Autonomous Republic"), affecting about 60,000 voters, noting there had been complaints of voting irregularities in those areas. The election was to be repeated in those areas on the 18 April. But, polling stations did not open in the two areas on that day. Nevertheless, on the same day the Central Electoral Commission pronounced the result of the general election, reporting that almost 1.5 million votes had been cast nationally. The applicant party did not obtain enough votes to win seats in Parliament.

At Strasbourg the applicant party contended, *inter alia*, that the introduction of an active voter registration system by the Georgian authorities undermined the practicality of P1-3's guarantee of free elections. The government responded that the new system had been introduced to remedy the inaccurate voter lists used for the 2003 election which had resulted in massive electoral fraud (and the subsequent "Rose Revolution"). The Chamber, unanimously, held that:

...the proper management of electoral rolls is a pre-condition for a free and fair ballot. Permitting all eligible voters to be registered preserves, *inter alia*, the principles of universality and the equality of the vote, and maintains general confidence in the State administration of electoral processes. The inaccuracy of electoral rolls may, in the eyes of the Court, seriously taint the effectiveness and practicability of electoral rights under Article 3 of Protocol No. 1...⁶⁹

The Chamber noted that independent observation of the 2004 general election by the Organisation for Security and Cooperation in Europe reported that the voter lists were better than those used in the previous 2003 election. Furthermore, the Court found that

⁶⁶ See, M. O'Boyle, "Electoral Disputes and the ECHR: An Overview", 30 (2009-10) *HRLJ* 1.

⁶⁷ "Right to free elections", Strasbourg, June 2012.

⁶⁸ No. 9103/04, 8 Jul. 2008.

⁶⁹ *Ibid.*, para. 82.

other Member States, including the UK, used active systems of voter registration. Given the diversity of registration systems in operation across Europe the Member States should be accorded “a wide margin of appreciation”⁷⁰ to select the system for their country. When assessing if a breach of P1-3 had occurred the Chamber stressed that electoral legislation had to be evaluated in the context of the political history of the respondent State.

The Court consequently considers that the active system of voter registration cannot in itself amount to a breach of the applicant party’s right to stand for election. Contrary to the applicant party’s allegation, in the particular circumstances of the present case, this system proved not to be the cause of the problem of ballot fraud but a reasonable attempt to remedy it, whilst not providing a perfect solution.

In the light of the above considerations, the Court concludes that, on balance, given the specific circumstances of the political situation in the respondent State, there has been no violation of the applicant party’s right to stand for election, as understood by Article 3 of Protocol No. 1, on account of the introduction on 27 February 2004 of the new voter registration system.⁷¹

Regarding the applicant party’s complaint that the exclusion of the two electoral districts from the national tally of votes had infringed P1-3, as the voters in those areas had been deprived of the right to vote, the government replied that Ajarian “armed criminals” had prevented the re-running of the ballot on 18 April 2004. The Chamber went on to conclude that the Central Election Commission’s decision, on 2 April 2004, to annul the election results in the two districts had not been reached in “a transparent and consistent manner”.⁷² The Commission had failed to provide sufficient reasons for its decision nor were there adequate procedural safeguards against an abuse of power by the Commission. The Chamber was also critical of the Commission’s “hasty” decision to conclude the election counting on 18 April 2004.

The exclusion of those two districts from the general election process was void of a number of rule of law requisites and resulted in a *de facto* disfranchisement of a significant section of the population...

There has accordingly been a violation of the applicant party’s right to stand for election under Article 3 of Protocol No. 1 on account of the *de facto* disfranchisement of the Khulo and Kobuleti voters.⁷³

The above judgment discloses the Court having to apply P1-3 against the backdrop of a post-revolutionary general election being held only four months after a popular uprising (ignited by a fraudulent general election) in a country where the central government did not exercise effective control over all of the national territory. Whilst the Court was sensitive to the historical background in which the spring 2004 elections were being held it still required the respondent State to guarantee the efficacy of the applicant party’s right to stand for office by seeking to secure support from voters in all election districts in the country. Jurisprudentially, it is interesting that the Chamber found a violation of this right contained in P1-3 (sometimes referred to as the “passive” right compared to the “active” right to vote⁷⁴) as O’Boyle observed that the Court has “been

⁷⁰ *Ibid.* para. 90.

⁷¹ *Ibid.*, paras. 92-93.

⁷² *Ibid.*, para. 141.

⁷³ *Ibid.*, paras 141-142.

⁷⁴ See *infra* n. 95 para. 67.

rather cautious” in determining this category of complaints.⁷⁵ The scale of the disenfranchisement, that underpinned the complaint, appeared to be a significant factor in the Court finding a breach in *The Georgian Labour Party* case.

An issue that has vexed several Member States with extensive democratic histories has been whether/when convicted prisoners can have the right to vote, under P1-3, removed from them. As is well-known⁷⁶ in *Hirst v UK (No.2)*⁷⁷, a Grand Chamber majority (twelve votes to five) found a breach of this right in respect of the applicant, who was at that time serving a discretionary life sentence for manslaughter. UK legislation provided that convicted prisoners serving any sentence of imprisonment were disqualified from voting (in local, national and European Parliament elections). The Grand Chamber reaffirmed that the right to vote is not a privilege and “[i]n the twenty-first century, the presumption in a democratic State must be in favour of inclusion...”⁷⁸ In the judgment of the majority the domestic legislation:

...remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.⁷⁹

But the President of the Court, with the support of his successor and three other judges, issued a dissent which forcefully expressed the view that it was not for the Court to determine the restrictions on voting rights of prisoners.

Our own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little. Taking into account the sensitive political character of this issue, the diversity of the legal systems within the Contracting States and the lack of a sufficiently clear basis for such a right in Article 3 of Protocol No. 1, we are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.⁸⁰

Perhaps encouraged by the lack of unanimity amongst the Grand Chamber judges and with a generally hostile domestic media and parliamentary attitude towards the enfranchisement of prisoners successive British governments delayed promoting amending legislation on prisoners’ voting rights. Five years later a unanimous Chamber, against the backdrop of about two and a half thousand UK prisoners having applied to

⁷⁵ *Supra* n. 66 at p.6.

⁷⁶ For detailed analyses of the domestic UK and Strasbourg judgments on this topic see S.Foster, “Reluctantly Restoring Rights: Responding to the Prisoner’s Right to Vote”, (2009) 9(3) *HRLR* 489 and “The Long and Winding Road: The Battle for the Prisoner’s Right to Vote”, (2011) *Cov. L.J.* 19.

⁷⁷ No. 74025/01, 6 Oct. 2005.

⁷⁸ *Ibid.*, para. 59.

⁷⁹ *Ibid.*, para. 82.

⁸⁰ *Ibid.*, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, para. 9.

the Court alleging a breach of the right to vote, issued a pilot-judgment against the UK.⁸¹ In *Greens and M.T. v UK*⁸², the Chamber laid down a specific time-frame for the government to introduce legislative reforms to secure compliance with P1-3 regarding prisoners. The Court did not seek to elaborate what the rules on prisoners' voting in the UK should be, but the judgment in *Greens* referred to the contemporary case of *FrodI v Austria*⁸³ as authority for the view that now disenfranchisement decisions affecting individual prisoners should be made by a judge.

A few months later another united Chamber found a breach of a prisoner's right to vote in *Scoppola v Italy (No.3)*⁸⁴. Under Italian legislation offenders sentenced to between three to five years imprisonment were disenfranchised for five years whilst offenders sentenced to over five years imprisonment were disenfranchised for life. The applicant had been convicted of murdering his wife and sentenced to life imprisonment (later reduced to thirty years imprisonment after he successfully brought a claim at Strasbourg relying on Article 6 and 7⁸⁵). The Italian government successfully petitioned for the case to be reheard by the Grand Chamber, under ECHR Article 43. Also, the UK government joined the proceedings as a third-party intervener (in accordance with ECHR Article 36(2)). The former government submitted that the disenfranchisement of convicted criminals in Italy was different from that dealt with in *Hirst* as the removal of the right to vote in Italy depended upon the sentences imposed by judgments in criminal cases. The UK government, relying on the joint dissent, contended that the judgment of the majority in *Hirst* was wrong and the Court should "revisit its decision".⁸⁶ In February 2011 the House of Commons had voted overwhelmingly (234 votes to 22) against reducing the disenfranchisement of prisoners serving sentences of imprisonment. In the view of the UK government States had a wide margin of appreciation to regulate the right to vote and they could decide which branch of the state (e.g. legislature or judiciary) had responsibility for determining prisoners' voting rights. Furthermore, referring to *FrodI*, the UK government argued that P1-3 did not require courts to make individual decisions on the disenfranchisement of convicted prisoners.

The Grand Chamber rejected the UK's plea for the majority judgment in *Hirst* to be overruled.

It does not appear, however, that anything has occurred or changed at the European and Convention levels since the *Hirst (no. 2)* judgment that might lend support to the suggestion that the principles set forth in that case should be re-examined. On the contrary, analysis of the relevant international and European documents... and comparative-law information... reveals the opposite trend, if anything – towards fewer restrictions on convicted prisoners' voting rights.

⁸¹ This was the first such judgment applied to the UK.

⁸² Nos. 60041/08 and 60054/08, 23 Nov. 2010.

⁸³ No. 20201/04, 8 Apr. 2010.

⁸⁴ No. 126/05, 18 Jan 2011.

⁸⁵ *Scoppola v Italy (No.2)*, No.10249/03, 17 Sep. 2009.

⁸⁶ *Scoppola v Italy (No.3)*, No.126/05, 22 May 2012 (Grand Chamber), para.78.

96. The Court accordingly reaffirms the principles set out by the Grand Chamber in the *Hirst* judgment... in particular the fact that when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it is not compatible with Article 3 of Protocol No. 1...⁸⁷

However, the Grand Chamber did accept the UK government's criticism of *FrodI*.

That reasoning takes a broad view of the principles set out in *Hirst*, which the Grand Chamber does not fully share. The Grand Chamber points out that the *Hirst* judgment makes no explicit mention of the intervention of a judge among the essential criteria for determining the proportionality of a disenfranchisement measure. The relevant criteria relate solely to whether the measure is applicable generally, automatically and indiscriminately within the meaning indicated by the Court ... While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed.⁸⁸

Noting the variety of approaches to the impositions of restrictions on prisoners' voting in the 24 Member States that provided for such limitations, the Grand Chamber held that it was for States, having regard to their own constitutional traditions, to decide if these restrictions were to be determined by legislation or courts. But, whichever method was adopted by States, the Court would have to determine if the right to vote, guaranteed by P1-3, had been infringed when an admissible complaint was brought before it.

In respect of Scoppola's complaint the Grand Chamber, subject to one dissent, found no breach of his right to vote. In the judgment of the Grand Chamber the Italian legal rules governing the deprivation of voting rights demonstrated that disenfranchisement took account of individual factors, including the seriousness of the offence and the behaviour of the offender.

On the same day as the delivery of the Grand Chamber's judgment in *Scoppola* (No.3), the Registrar of the Court issued an unusual Press Release on the implications of that ruling.⁸⁹ This noted that the UK had six months to comply with the pilot-judgment timetable for introducing measures to reform the general disenfranchisement of serving prisoners.⁹⁰

The above cases demonstrate the Court's generally robust protection of the implied (active) right to vote embodied within P1-3 for an unpopular category of persons. Nevertheless, the Grand Chamber's judgment in *Scoppola* (No.3) reveals that the highest judicial authority at Strasbourg accepted that the Chamber in *FrodI* had gone too far in holding (legislating?) that individual disenfranchisement decisions concerning prisoners had to be made by judges. Whilst it is now clear that the Court will not accept

⁸⁷ *Ibid.*, paras. 95-96.

⁸⁸ *Ibid.*, para. 99.

⁸⁹ ECHR 222(2012), Strasbourg, 22 May 2012.

⁹⁰ Just before the expiry of that deadline the Justice Secretary, Chris Grayling, presented a draft Bill to Parliament contain three options: (a) retaining the ban on all convicted prisoners, (b) enfranchising convicted prisoners serving sentences of up to six months' imprisonment or (c) enfranchising prisoners serving sentences up to four years in duration. The Shadow Justice Secretary, Sadiq Khan, stated that the Labour Party continued to support the existing ban. The BBC's Deputy Political Editor expressed the view that the draft Bill would be subject to a lengthy period of consideration by Parliament: BBC online "MPs can force the UK to keep ban on prisoner votes-minister", 23 Nov. 2012.

the general disenfranchisement of all serving prisoners⁹¹, States still have considerable freedom to curtail the voting rights of convicted persons. Indeed as Judge Thor Bjorgvinsson pointed out in his dissent in *Scoppola (No.3)* the Italian disenfranchisement rules, upheld by the majority of the Grand Chamber, were more extensive in part than the UK's general ban on voting by serving prisoners (for example in Italy the ban on voting could extend beyond an offenders release from prison- up to a lifetime's disenfranchisement). For instance, since his release on licence Hirst has regained his full voting rights.

The Court has required an individual judicial decision be taken in respect of the disenfranchisement of persons suffering from mental disabilities. In *Alajos Kiss v Hungary*⁹², the applicant was a 56- year-old who had been diagnosed with manic depression in 1991. During 2005 he was placed under partial guardianship. The Hungarian Constitution removed the right to vote from all persons placed under total or partial guardianship. Before the Court the government argued that States have a wide margin of appreciation to regulate the right to vote and the measure imposed on the applicant was designed to ensure that only persons who were capable of evaluating their decisions should be allowed to participate in public affairs. The applicant responded that States ought to be accorded a narrower margin of appreciation regarding restrictions on the voting rights of people with disabilities and the Hungarian disenfranchisement of all those subject to guardianship orders affected 0.75% of the electorate.

A united Chamber held that:

The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing (*Hirst v. the United Kingdom (no. 2, § 82)*). In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question...

The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote.⁹³

As this had not occurred in the disenfranchisement of the applicant he had suffered a violation of P1-3 and the Chamber awarded him 3,000 euros as compensation for his non-pecuniary damage.

The Chamber's ruling in *Kiss* can be distinguished from the prisoners' voting cases discussed previously, because, *inter alia*, it is impossible for the legislature to specify which particular members of the electorate should be disenfranchised due to their mental disabilities. Such decisions require an independent assessment of the facts of each elector's ability to comprehend her/his power to vote. Whereas, *Scoppola (No.3)* showed how the legislature could determine that certain categories of prisoners (e.g. those sentenced to three years' imprisonment) thereby forfeited their right to vote for defined periods of time due to the seriousness of their offending. More generally, R. O'Connell has argued that the Court needs to be "attentive" to the difficulties faced by

⁹¹ This was confirmed by a unanimous Chamber in *Anchugov and Gladkov v Russia*, No. 11157/04, 4 Jul 2013, where the Constitutional ban on all convicted prisoners voting in elections for the State Duma was found to violate P1-3.

⁹² No. 38832/06, 20 May 2010.

⁹³ *Ibid.*, paras. 42 and 44.

minorities, including the physically and mentally disabled, if the Convention's "vision of an "effective political democracy"" is to be achieved.⁹⁴

In recent times the Grand Chamber has been cautious about imposing contentious electoral obligations on Member States where there is no clear consensus in the practice of States. The applicants in *Sitaropoulos and Giakoumopoulos v Greece*⁹⁵, were Greek citizens employed as officials of the Council of Europe and resident in Strasbourg. They applied to the Greek Ambassador in France to be permitted to vote, in France, in the Greek general election to be held on 17 September 2007. The Ambassador replied that statutory rules governing expatriate voting did not exist and therefore it was not possible for the applicants to vote in France. Subsequently the applicants complained to the Court alleging a breach of their right to vote under P1-3. A Chamber upheld their complaint, by five votes to two.⁹⁶ The government then successfully applied for the case to be referred to the Grand Chamber. Before the latter body the applicants repeated their contention that the Greek Parliament's failure, for over 35 years, to enact legislation regulating overseas voting by expatriate citizens constituted a breach of P1-3. The government responded, *inter alia*, that the Greek constitution provided the option for Parliament to legislate on expatriate voting rights and this was a "delicate political issue", demonstrated by the failure of a government Bill on the matter to gain parliamentary approval in 2009. The significant size of the expatriate Greek citizenry (about 3.7 million persons) compared to the resident population (11 million) meant that it was necessary to secure agreement amongst the Greek political parties as to expatriate voting arrangements. Therefore, granting such rights should fall within the margin of appreciation of Member States.

The Grand Chamber noted that both the Parliamentary Assembly⁹⁷ and the Venice Commission⁹⁸ had encouraged States to facilitate voting by expatriates. But, whilst the majority of Member States allowed such voting, their arrangements varied greatly. Consequently, the Grand Chamber held that, "...none of the legal instruments examined above forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote."⁹⁹ Therefore, it was not for the Court to determine the manner in which the Greek Parliament gave effect to the Constitution's authorisation of legislation permitting expatriate voting. Nor did the Grand Chamber find that the applicants had been placed under a disproportionate burden in having to travel from Strasbourg to Greece if they had exercised their right to vote in the general election. Unanimously the Grand Chamber determined that no breach of P1-3 had occurred.

Given the absence of a clear European consensus on expatriate voting rights and mechanisms, combined with the divisive nature of the issue within the Greek political system the restraint of the Grand Chamber in the above judgment can be commended. The unsuccessful attempt by the government to secure legislation regulating expatriate

⁹⁴ R. O'Connell, "Realising political equality: The ECtHR and positive obligations in a democracy", 61(3) (2010) *NILQ* 263, p. 279.

⁹⁵ No. 42202/07, 15 Mar. 2012.

⁹⁶ Judgment of 8 Jul. 2010. For criticism of the majority's reasoning see, M. Ioannidis, "The ECtHR, National Constitutional Law, and the Limits of Democracy: *Sitaropoulos and Others v Greece*", 17 *Eur. Pub. L.* 661 (2011).

⁹⁷ Resolution 1459 (2005).

⁹⁸ Study no. 580/2010.

⁹⁹ *Supra* n.95 para. 75.

voting in 2009 highlighted that the national authorities were not ignoring this controversial matter.

Conclusions

We have learnt from the cases analysed in this study that the modern Court has confirmed the original Court's emphasis upon pluralism as being at the heart of the concept of democracy embedded within the ECHR. However, the recent jurisprudence also discloses that the Court has extended the established case-law to embrace newer forms of political expression, like the "political performance" aimed at media coverage via the web, rather than traditional public meetings, that the applicants in *Tatar and Faber* had organised. Furthermore, the Court has recognised, and endorsed, the important role that NGOs can play in facilitating, *inter alia*, public policy debate and formulation in democratic societies, see for example *Tarsasag*. The responsibilities of States to promote and safeguard the audiovisual media's accurate coverage of the breadth of views on political matters within their societies, has been elaborated in the contemporary jurisprudence. *Manole* clearly demonstrates that a free and diverse mass media, which is a pre-requisite for the proper functioning of democratic societies, not only requires restraints on the abuse of governmental powers but also positive actions by public bodies (such as the enactment of legislative frameworks that guarantee impartial coverage of political news by television and radio broadcasting networks).

There are still areas of the Court's jurisprudence concerning democratic issues that need clarification. An example being the breadth of the margin of appreciation the Court should accord to domestic authorities when determining the meaning and impact of controversial political symbols. The Grand Chamber ought to provide an authoritative ruling on this topic and, as we have discussed earlier, there are good reasons for the Court deferring to domestic determinations where they have been made by independent and expert authorities.

When developing its case-law on the promotion of democracy the Court quite often has regard to the views of other Council of Europe institutions. Two bodies whose opinions are regularly considered by the Court, for example in *Sitaropoulos and Giakoumopoulos*, are the Parliamentary Assembly and the Venice Commission. In his study on P1-3 Sergey Golubok observed that the Court appeared to be more receptive to the views of the latter organisation.¹⁰⁰ He speculated that it could be the absence of a "political agenda" by the independent legal experts, who constitute the Venice Commission, that gives its views such persuasive authority in the reasoning of the Court.

It may well lead to the Venice Commission insofar as cases on Article 3 of the Protocol are concerned becoming the body equivalent to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) whose opinions are always very influential in so far as cases on Article 3 of the Convention are concerned.¹⁰¹

By having regard to the views of other relevant European bodies and the extent to which there is a European consensus¹⁰² on the point in issue, for example concerning restrictions on political advertising in *Animal Defenders International*, the Court can refine its democracy jurisprudence without being justifiably accused of impermissible law-making.

¹⁰⁰ S. Golubok, "Right to Free Elections: Emerging Guarantees or Two Layers of protection?", 27(3) (2009) *Netherlands Quarterly of Human Rights* 361.

¹⁰¹ *Ibid.*, p. 389.

¹⁰² See, K. Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] *Public Law*, 534.

Beyond Europe the Court's extensive jurisprudence on the promotion of democracy offers fertile ground for the on-going debate amongst public international law scholars as to the existence/extent of a right under international law to democratic governance. Tom Franck initiated that debate in 1992¹⁰³ and it is still being rigorously conducted.¹⁰⁴ The Court's judgments on topics ranging from symbolic protests by pro-abortion campaigners (*Women on Waves*) to active voter-registration systems (*The Georgian Labour Party*) reflect how an international court can seek to enhance democracy across a large group of States with widely differing constitutional histories during the last half century, including fascist dictatorships (Spain, Portugal), military regimes (Greece, Turkey) and totalitarian communist regimes (Russia and the former Soviet bloc States).

¹⁰³ T. Franck, "The Emerging Right to Democratic Governance", 86 (1992) *American Journal of International Law* 46.

¹⁰⁴ See, for example, the dialogue between Susan Marks, "What has become of the emerging right to democratic governance?", (2011) *European Journal of International Law* 507 and Jean D'Aspremont, "The rise and fall of democracy governance in international law: a reply to Susan Marks", (2011) *European Journal of International Law* 549.